Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-541–03 OF 2014
DAVID WONG, VARGHESE GEORGE AND BADARIAH SAHAMID JJCA
1 DECEMBER 2014

Civil Procedure — Appeal — Cross-appeal — Striking out cross-appeal — Scope or extent of matters that could rightfully be pursued under a cross-appeal — Appellant's appeal limited to a specified part of judgment — Whether respondent could bring a cross-appeal in relation to other parts of the judgment not appealed against — Whether cross-appeal must be limited to the issue raised on appeal — Rules of the Court of Appeal 1994 rr 5, 8, Form 2

The appellant/plaintiff and first respondent/first defendant had executed a memorandum of understanding ('MOU') whereby the first respondent agreed to sell to the appellant the entire issued shares in the second respondent. In breach of the terms of the MOU, the first respondent had refused to execute a formal sale and purchase agreement. The appellant thus sought specific performance of the sale and purchase agreement alternatively damages in lieu of or in addition to specific performance. The learned trial judge ('judge') held that the appellant had proved their case on a balance of probabilities and that there had come into existence a valid and binding contract between the first respondent and the appellant for the sale and purchase of the shares. Premised on that specific finding, the court ordered compensation in lieu of specific performance, rather than grant the order for specific performance sought by the appellant. The appellant filed a notice of appeal against only some parts of the decision of the judge (and not the whole). The appellant's appeal was basically limited against the judge's decision refusing the order for specific performance, notwithstanding that a concluded and binding contract had been found proven on the evidence in favour of the appellant. The first respondent filed a notice of cross-appeal. The appellant submitted that pursuant to r 8 of the Rules of the Court of Appeal 1994 ('the RCOA') and Form 2 of the RCOA, since the appellant's appeal was limited to the refusal of specific performance, the first respondent's cross-appeal must be similarly limited to that issue and that the first respondent could not be heard on other matters not raised in the original appeal. It was thus contended that the first respondent was precluded from challenging the finding of the court that there existed a valid and binding contract between the first respondent and the appellant. Counsel for the appellant thus raised a preliminary issue for determination as to the scope or extent of matters that could rightfully be pursued under a cross-appeal.

Held:

(1) The words 'should be varied ... specifying the grounds thereof' and 'to be varied to the extent' in r 8 and Form 2 respectively of the RCOA, do not carry with them a meaning that there could be a total or wholesale setting aside or review (of the substantive judgment or any findings of the court); the extent of any contention under a cross-appeal, is to be limited to a modification or some slight difference to be made to that part only of the judgment appealed against. This is borne out by the terminology used – '...varied to the extent ...' clearly pointing to a limitation of sorts in the scope of the matters to be advanced by way of the cross-appeal, that is, those words being given an ordinary and natural reading (see para 25).

(2) This is also consistent with the scheme of things envisaged under r 5 of the RCOA. There it is provided for an appeal to be lodged against the whole or part of any judgment or order of court and such an appeal (in contrast to a cross-appeal) is by a re-hearing. The word 're-hearing' used here clearly anticipates a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence if it is the substantive finding of the court that is intended to be attacked, it behoves upon the party aggrieved to file a proper notice of appeal (see para 26).

(3) The appellant (being satisfied as to the finding of fact that there was a binding contract but dissatisfied that no specific performance had been ordered) was appealing only against a part of the judgment, namely that the court ought to have in all the circumstances allowed the relief of an order of specific performance of the contract rather than that damages in lieu thereof be recovered from the first respondent. Given that was the scope of the appeal itself, any cross-appeal by the first respondent that could be pursued was necessarily limited, as to the dissatisfaction with the damages in lieu (to be assessed), the further damages in the sum of RM841,691.94 and costs of RM150,000 ordered against the first respondent (see para 31).

(4) The effect sought by way of the first respondent cross-appeal was to set aside the finding of court that there was a 'concluded contract'. This could only be pursued by the first respondent by filing a proper and separate notice of appeal within the one month allowed for an appeal to be lodged. Accordingly, the first respondent was precluded in the course of advancing their cross-appeal from raising any argument that there was no valid and concluded contract as held by the judge (see paras 38–39).

[Bahasa Malaysia summary

Perayu/plaintif dan responden pertama/defendan pertama telah melaksanakan memorandum persefahaman ('MP') di mana responden pertama bersetuju untuk menjual kepada perayu kesemua saham yang diisukan oleh responden kedua. Dalam pelanggaran terma-terma MP, responden pertama terpaksa

menolak untuk melaksanakan perjanjian jual beli secara formal. Perayu dengan itu memohon pelaksanaan spesifik perjanjian jual beli sebagai alternatif ganti rugi gantian atau sebagai tambahan kepada pelaksanaan spesifik. Hakim perbicaraan bijaksana ('hakim') memutuskan bahawa perayu telah membuktikan kes mereka atas imbangan kebarangkalian dan bahawa telah terwujud satu kontrak yang sah dan mengikat antara responden pertama dan perayu untuk jualan dan belian saham. Berdasarkan kepada dapatan spesifik berikut, mahkamah memerintahkan pampasan gantian pelaksanaan spesifik, daripada memberikan perintah untuk pelaksanaan spesifik yang dipohon oleh perayu. Perayu menfailkan notis rayuan hanya terhadap beberapa bahagian kepada keputusan hakim (bukan keseluruhan). Rayuan perayu secara asasnya terhad kepada keputusan hakim menolak perintah untuk pelaksanaan spesifik, walaupun kontrak yang dibuat dan mengikat telah didapati terbukti berdasarkan keterangan yang memihak kepada perayu. Responden pertama memfailkan notis rayuan silang. Perayu mengemukakan bahawa menurut k 8 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR') dan Borang 2 KKMR, oleh kerana perayu adalah terhad kepada penolakan pelaksanaan spesifik, rayuan silang responden pertama hendaklah sama terhad kepada isu tersebut dan bahawa responden pertama tidak boleh didengar untuk perkara lain yang tidak ditimbulkan dalam rayuan asal. Adalah oleh itu dihujahkan bahawa responden pertama telah dihalang daripada mencabar keputusan mahkamah bahawa wujud kontrak yang sah dan mengikat antara responden pertama dan perayu. Peguam bagi perayu oleh itu menimbulkan isu awal untuk penentuan tentang skop atau takat perkara yang berhak boleh diteruskan di bawah rayuan silang.

Diputuskan:

(1) Perkataan 'should be varied ... specifying the grounds thereof.' dan 'to be varied to the extent' dalam k 8 dan Borang 2 KKMR, tidak membawa bersama mereka erti bahawa boleh terdapat secara keseluruhan atau kesemuanya diketepikan atau kaji semula (terhadap penghakiman substantif atau apa-apa dapatan mahkamah); setakat apa-apa pertikaian di bawah rayuan balas, hendaklah terhad kepada suatu pengubahsuaian atau beberapa sedikit perbezaan dibuat kepada bahagian hanya penghakiman yang dirayukan itu. Ini dapat dilihat dari istilah yang digunakan '... varied to the extent...' jelas menunjukkan kepada had dalam bidang perkara yang akan dilanjutkan dengan cara rayuan balas itu, iaitu, kata-kata yang diberikan bacaan biasa dan semula jadi (lihat perenggan 25).

(2) Ini juga konsisten dengan skema perkara-perkara yang digambarkan di bawah k 5 KKMR. Di sana ia diperuntukkan rayuan yang akan dibuat terhadap keseluruhan atau sebahagian daripada mana-mana penghakiman atau perintah mahkamah dan apa-apa rayuan (berbeza kepada rayuan balas) adalah dengan pendengaran semula. Perkataan

're-hearing' yang digunakan di sini nyata menunjukkan kaji semula atau regurgitasi di hadapan mahkamah rayuan bagi semua mata dan hujah-hujah yang diambil di mahkamah di bawah. Oleh itu jika ia adalah dapatan substantif mahkamah yang bertujuan untuk dibidas, adalah sepatutnya atas pihak yang terkilan untuk memfailkan notis rayuan yang betul (lihat perenggan 26).

(3) Perayu (berpuas hati tentang dapatan fakta bahawa terdapat kontrak yang mengikat tetapi tidak berpuas hati bahawa tiada pelaksanaan spesifik telah diperintahkan) merayu hanya terhadap sebahagian daripada penghakiman itu, iaitu bahawa mahkamah sepatutnya ada dalam semua keadaan membenarkan relif perintah pelaksanaan spesifik kontrak dan bukan supaya jumlah ganti rugi sebagai gantinya diperolehi semula daripada responden pertama. Memandangkan adalah bidang rayuan itu sendiri, apa-apa rayuan balas oleh responden pertama yang boleh diteruskan semestinya terhad, berkenaan rasa tidak puas hati dengan ganti rugi sebagai ganti (akan ditaksir), ganti rugi selanjutnya dalam jumlah RM841,691,94 dan kos sebanyak RM150,000 diperintahkan terhadap responden pertama (lihat perenggan 31).

(4) Kesan dipohon melalui responden pertama rayuan balas adalah untuk mengetepikan dapatan mahkamah bahawa terdapat satu 'concluded contract'. Ini hanya dapat dilaksanakan oleh responden pertama dengan memfailkan notis rayuan yang betul dan berasingan dalam tempoh satu bulan yang dibenarkan untuk rayuan untuk dibuat. Oleh itu, responden pertama telah dihalang dalam kausa melanjutkan rayuan balas mereka daripada membangkitkan apa-apa hujah bahawa tiada kontrak yang sah dan terikat seperti yang diputuskan oleh hakim (lihat perenggan 38–39).]]]]]]

Notes

For a case on cross-appeal, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 1098.

Cases referred to

Bandur et al v Daiken et al [1967] 1 OR 629, CA (refd)
In Re Cavander's Trusts (1881) 16 Ch D 270, CA (refd)
National Society for the Distribution of Electricity by Secondary Generators v Gibbs [1900] 2 Ch 280, CA (refd)

Legislation referred to

Rules of Court 1875 [UK] O 58 rr 1, 6
Rules of the Court of Appeal 1994 rr 5, 6, 8, 12, Form 1, Form 2

Appeal from: Suit No 22NCC-1074–07 of 2012 (High Court, Kuala Lumpur)

Cecil Abraham (Rishwant Singh and Esther Yee with him) (Zul Rafique & Partners) for the appellant.
Cyrus Das (Ong Chee Kwan and Chew Pei Ying with him) (Christoper & Lee Ong) for the first respondent.
Lambert Rasa-Ratnam (Ang Hean Leng and Tan Chia Wen with him) (Lee Hishamuddin Allen & Gledhill) for the second respondent.
Darryl Goon (Maidzura Mohammed, Mathew Thomas Philip and Tan Jee Tjun with him) (Thomas Philip) for the third respondent.

Varghese George JCA:

INTRODUCTION

[1] When this appeal was called, counsel for the appellant raised a preliminary issue for determination by us, before the parties were heard further.

The question posed was as to the scope or extent of matters that could rightfully be pursued under a cross-appeal, in this case, within the purview of the notice of cross-appeal dated 15 April 2014 filed by the first respondent in the matter of the appeal of the appellant.

[2] It was pointed out to us that the appeal before us was only against part of the judgment of the High Court of 11 March 2014. It was contended by the appellant that first respondent's cross-appeal should be restricted to vary that part of the order that was being appealed and not be permitted to seek to reverse any other aspects of the decision of the High Court. If the latter had been the intention of the first respondent, then, it was submitted that, a notice of appeal itself as against the substantive orders that the first respondent complained or was aggrieved about had to have been filed within the deadline fixed for appeals to be lodged.

[3] Having heard the parties, we were of the view that the cross- appeal of the first respondent was in effect and for all intents and purposes seeking to set aside or reverse a substantive decision of the High Court which was not the subject of the appellant's appeal here.

Given that context, the first respondent ought to have filed a notice of appeal before expiry of the stipulated one month from the date of delivery of the High Court decision. This had not been done and accordingly the first respondent was precluded from canvassing arguments against that substantive decision not appealed against by the appellant in the first place.

[4] We now set out the grounds for holding so. In this grounds only such of the facts and issues in the principal suit as are material or necessary in respect of

our aforesaid ruling are reproduced or referred to. The appellant was the plaintiff and the first respondent was the first defendant at the High Court proceedings.

BACKGROUND

[5] In so far as the first respondent was concerned, the material allegations of the appellant in the suit were:

(a) on 16 March 2012 the appellant and first respondent had executed a memorandum of understanding in Hong Kong ('HK MOU') whereby the first respondent agreed to sell to the appellant the entire issued shares in the second respondent for a total consideration of US$25.3m and the terms therein found. Earlier the parties had entered into a memorandum of understanding dated 8 December 2011 and extensive legal, financial and operational due diligence had been carried out before the HK MOU was entered (paras 5, 7 and 8 of the re-amended statement of claim); and

(b) in breach of the terms of the HK MOU, the first respondent had refused to execute a formal sale and purchase agreement and/or to accept the 20% part payment of the purchase consideration on 23 March 2012 (para 17 of the re-amended statement of claim).

[6] The reliefs sought by the appellants as against the first respondent were:

(a) Specific Performance of the sale and purchase agreement for the sale of shares to have been executed on 23.03.2012 between the Plaintiff and 1st Defendant for the sale and purchase of the entire issued shares of the 2nd Defendant ...;

(b) Further and/or in the alternative damages for the sum of RM101,224,194.94 for the 1st Defendant's breach of contract in lieu of specific performance;

(c) Further and/or in the alternative damages in addition to specific performance;

(d) Interest ...;

(e) Damages for conspiracy to injure and/or defraud to be assessed;

(f) Costs.

[7] The judgment of court of the 11 March 2014 given after the trial of the appellant's action (and the counterclaim of the third respondent), were as follows:

> ... IT IS THIS DAY ADJUDGED that the Plaintiff's claim for specific performance against the 1st Defendant is dismissed AND FURTHER IT IS ADJUDGED that the 1st Defendant do pay to the Plaintiff –

A (a) damages in lieu of specific performance to be assessed;

(b) the sum of RM841,691.94 (Ringgit Malaysia Eight Hundred Forty-One Thousand Six Hundred Ninety-One and Sen Ninety-Four) as expenditure incurred by the Plaintiff in this transaction; and

B (c) costs of RM150,000.00 (Ringgit Malaysia One Hundred Fifty Thousand);

AND IT IS FURTHER ADJUDGED that the Plaintiff's claim against the 2nd Defendant be dismissed with costs of RM50,000.00 (Ringgit Malaysia Fifty Thousand) to be paid by the Plaintiff to the 2nd Defendant AND IT IS FURTHER C ADJUDGED that the Plaintiff's claim against the 3rd Defendant be dismissed AND IT IS FURTHER ADJUDGED BY WAY OF counterclaim OF THE 3RD Defendant that –

(a) a declaration is hereby given that the Hong Kong Memorandum does not give rise to a legal interest in a part of the land held under HS(D) 195059 D PTD 59410 PTD 59409, in the Mukim of Pulai District of Johor Bahru, in the State of Johor, measuring approximately 104 acres (from the whole 166 acres therein)('Walker Land');

(b) a declaration is hereby given that the Plaintiff has no caveatable interest in the Walker Land; E

(c) the Registrar of Titles be directed to remove Private Caveat No. 18130/2012 dated 30.5.2012 entered against the Walker Land within 7 days from the date of the Order;

(d) damages to be assessed; F

(e) costs of RM50,000.00 (Ringgit Malaysia Fifth Thousand) to be paid by the Plaintiff to the 3rd Defendant;

AND IT IS FURTHER ADJUDGED that the Order for Injunction dated 7 November 2012 pursuant to the Plaintiff's Notice of Application in Enclosure 11 G be and is hereby discharged AND IT IS LASTLY ADJUDGED that the Order for Mareva Injunction dated the 21 Mac 2013 to the Plaintiff's Notice of Application in Enclosure 72 (as amended in the Court of Appeal Order dated 21 August 2013 in Civil Appeal No. W-02(IM)(NCC)-988-04/2013) be and is hereby discharged and the Plaintiff do pay costs of RM3,000.00 (Ringgit Malaysia Three Thousand) to the 2nd Defendant.

H

[8] On 12 March 2014, the appellant filed a notice of appeal against only some parts of the decision of the learned judge (and not the whole). The English translation of the notice of appeal in its material parts are reproduced below: I

NOTICE OF APPEAL

TAKE NOTICE that Leisure Farm Corporation Sdn Bhd being dissatisfied with the decision of the Honourable Justice Datuk Hasnah Bt Mohammed Hashim given at Kuala Lumpur on the 11th of March 2014 appeals to the Court of Appeal

against such part only of the said decision of the Honourable Justice, that is:

(a) Against the decision of the Honourable Justice in disallowing specific performance as prayed by the Plaintiff against the 1st Defendant;

(b) Against the decision of the Honourable Justice in dismissing the Plaintiff's claim against the 2nd Defendant;

(c) Against the decision of the Honourable Justice in dismissing the Plaintiff's claim against the 3rd Defendant;

(d) Against the decision of the Honourable Justice on the Defendants' liability on conspiracy and/or related issues; and

(e) Against the decision of the Honourable Justice in allowing the 3rd Defendant's counterclaim against the Plaintiff.

[9] On 15 March 2014 (that is, after the record of appeal had been filed by the appellant), the first respondent's solicitors filed the now contentious notice of cross-appeal, the English translation of which is set out here:

NOTICE OF CROSS-APPEAL

TAKE NOTICE, that on the hearing of the above appeal, KABUSHIKI KAISHA NGU (formerly known as DAI-ICHI SHOKAI) the 1st Respondent above-named, will contend that whole of the decision of the Honourable Justice Datuk Hasnah Bt Mohammed Hashim given at Kuala Lumpur on the 11th day of March 2014 ought to be varied to the extent and on the grounds hereinafter set out –

(a) *Reliefs claimed*

(i) an order that the damages in lieu of specific performance to be assessed granted by the learned Honourable Justice be set aside;

(ii) an order that the sum of RM841,691.94 (Ringgit Malaysia Eight Hundred Forty-One Thousand Six Hundred Ninety-One and Sen Ninety-Four) as expenditure incurred by the Appellant in this transaction granted by the learned Honourable Judge be set aside;

(iii) an order that the costs of RM150,000.00 to be paid by the 1st Respondent to the Appellant granted by the learned Honourable Justice be set aside.

(b) *Grounds relied upon*

(i) the learned Judge erred in law in deciding that the Hong Kong Memorandum executed on 16.3.2012 (the 'Hong Kong MOU') constitutes a valid and binding contract between the Appellant and the 1st Respondent for the sale and purchase of the entire issued shares of the 2nd Respondent for the consideration price of US$25.3 million;

(ii) the learned Judge erred in law in deciding that the intention of the

1st Respondent is to create a legal and binding agreement through the Hong Kong MOU;

(iii) the learned Judge erred in law in failing to take into consideration that the Hong Kong MOU is an extension of the Memorandum of Understanding dated 8.12.2011 (the 'MOU') and is similarly non-binding in nature;

(iv) the learned Judge erred in law and fact in failing to take into consideration that the MOU is non-binding;

(v) the learned Judge ought to have held that neither the MOU of the Hong Kong MOU was binding in law until a definite agreement was executed between the parties;

(vi) the learned Judge ought to have held that as the warranties were still being discussed which would in turn would affect price, no concluded agreement would have come into force;

(vii) the learned Judge erred in law and fact in deciding that the terms and conditions of the sale of shares of the 2nd Respondent by the 1st Respondent to the Appellant had been definitively agreed upon and were conclusive;

(viii) the learned Judge erred in law and fact in failing to consider that the transaction involves the purchase of the 2nd Respondent's shares and not the 2nd Respondent's land;

(ix) the learned Judge erred in law in failing to consider that the Hong Kong MOU contravenes Section 67 of the Companies Act 1965 where the Hong Kong MOU provides that the 1st Respondent was to give its land titles as security for the refund of the Appellant's payment of the 20% deposit towards the purchase consideration;

(x) the learned Judge erred in law and in facts in allowing damages in lieu of specific performance to be assessed where the Appellant failed to plead and/or prove any damages suffered during trial;

(xi) the learned Judge erred in law and fact to order the sum of RM841,691.94 as expenditure incurred by the Appellant in the transaction as no evidence was produced during trial by the Appellant in relation to the expenditure of RM841,691.94 for the transaction and or that such expenditure could not be legally recoverable as the Appellant would have to incur the same in any event.

The 1st Respondent reserves the right to amend and/or submit further grounds upon receipt of the written grounds of judgment by the Honourable Justice.

[10] In the grounds of the judgment subsequently issued on 20 May 2014, the learned judge stated that the appellant had proved their case on a balance of probabilities against the first respondent. The relevant passage from the grounds was as follows:

I am mindful that it is expressly provided in the 2011 MOU that the MOU '... does not constitute an offer or commitment by the Parties hereto and is intended to serve as a basis for Definitive Agreement only ...' and '... The terms and conditions stated in this MOU are not intended to be and shall not constitute legally binding obligations unless specifically provided for herein ...' the conduct of the parties shows otherwise, that is, an intention to create a legal and binding relation. The Hong Kong MOU which was signed after the 2011 MOU did not state specifically at all that the terms were not binding. Item 3 of the Hong Kong MOU specifically provides that the final price of the transaction is US25.3m and that there will be no more negotiation of the price. The plaintiff was at all material time ready to proceed with the execution of the SPA. It was only on the eve of the signing of the SPA that the plaintiff was notified through the first defendant's new solicitor Yap Wai Meng that he was appointed to take over from Mr David Ong.

In this instant case, there was a meeting of minds between the parties. There was consideration, certainty of parties, certainty of the price and certainty of property. Although the terms and conditions of the agreement are not embodied in a formal contract, a valid and binding agreement had been concluded between the parties.

The conduct of the parties shows an intention to create a legal and binding relation. Mr Sugiki may not be fluent or understand English but he is a shrewd businessman and the sole architect of this transaction. Kameda (PW1) was present at the negotiations between Mr Sugiki and Mr Lee and confirmed that the parties had intended to enter into a agreement.

[11] Further down in the grounds of judgment, it was also stated:

Similarly, in the instant case, the plaintiff and the first defendant had drawn up the Hong Kong MOU specifying the essential terms. There was clearly an offer to sell by the first defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and certainty of property (the shares and the golf course). There were continuous discussions between the parties with the intention to enter into a formal agreement based on the terms of the MOUs. The Federal Court in *Ho Kam Phaw v Fam Sin Nin* [2000] 2 MLJ 529; [2000] 3 CLJ 1 (FC) held that in law, there was already a concluded contract when the plaintiff approved the draft. In the instant case before this court there was not only consensus ad idem between the parties but the necessary *animus contrahendi*.

Therefore, from my perusal of the evidence before me, especially the MOUs, e-mails, the draft SPA, and the written submissions of the parties, I find that there the MOUs executed between the plaintiff and the first defendant is a concluded and binding contract between the parties.

[12] With regard to the appellant's prayer for specific performance the learned judge noted:

The plaintiff seeks specific performance from the defendants for the failure to formalise the SPA. The Specific Relief Act 1950 (Act 137) confers on the court a discretion to order specific performance against a constracting party to perform an obligation that it had undertaken to perform under the contract ...

A ...

...

Section 18 of the Act provides the court with powers to order 'compensation' in lieu of an order for specific performance in appropriate situations ...

B ...

In the particular circumstances surrounding the transaction, I hold that the plaintiff is entitled to an order for compensation to be recovered from the first and second defendants for the breach by the first defendant of the terms of the MOU. However, due to the existence of the SPA between the first defendant and the second C defendant, specific performance may not be appropriate in this case such that the alternative claim will be allowed.

[13] It was obvious that the learned judge had as a matter of fact found that D there had come into existence a valid and binding contract between the first respondent and the appellant for the sale and purchase of all shares in the second respondent (whose assets included the golf course land) and premised on that specific finding, the court had opted to order compensation in lieu of specific performance, rather than grant the order for specific performance E sought by the appellant.

The appellant's appeal was basically limited against the learned judge's decision refusing the order for specific performance, notwithstanding that a concluded and binding contract had been found proven on the evidence in favour of the F appellant.

THE APPELLANT'S SUBMISSION

[14] The thrust of appellant's submission on this preliminary issue was that G since the appellant appeal vis a vis the first respondent was limited to the refusal of specific performance, the first respondent's cross-appeal must be similarly limited to that issue. The first respondent could not be heard on other matters not raised in the original appeal (*In Re Cavander's Trusts* (1881) 16 Ch D 270).

H **[15]** It was submitted pursuant to r 8 of the Rules of the Court of Appeal 1994 ('RCOA 1994') and the specified Form 2 of the RCOA 1994, the first respondent was limited to varying such part of the order of court which was subject of the appeal. The first respondent was precluded therefore from challenging any other substantive finding of fact, including as was being I attempted here to set aside or overturn the finding of the court that there existed a valid and binding contract between the first respondent and the appellant. We were referred to grounds set out under (b) in the notice of cross-appeal and also to the overall tenor of the written submissions now filed for the first respondent.

[16] It was argued that the first respondent ought to have filed a notice of appeal if their complaint was as to the finding of the court that there existed a contract and wished to have this reversed. Such anotice of appeal had to be filed and served within one month of the decision. The first respondent was, in any case, clearly out of time when the cross-appeal was filed to pursue this line of contention.

THE FIRST RESPONDENT'S SUBMISSION

[17] Counsel for the first respondent sought to dismiss the appellant's objections as merely a technical one, and pointed out that the notice of cross-appeal complied substantially with the requirements found in Form 2.

It was submitted that the target of the cross-appeal was to vary the three orders set out in para (a) of the notice of cross-appeal and the grounds for the same included the contention that the learned judge had erred in holding that there was a valid and binding contract between the first respondent and the appellant.

[18] It was also highlighted to us that when the decision was delivered in court, there was no specific order or pronouncement made by the learned judge to the effect that there was a valid and binding contract by virtue of the HK MOU. This only surfaced when the grounds of judgment was subsequently issued. If there was such a declaration or pronouncement, then perhaps the first respondent would have been obliged to file a notice of appeal.

[19] It was also submitted that the term 'vary' found in r 8 and Form 2 was wide enough to encompass within its meaning an intention to 'substantively amend' or even to 'set aside' the order or judgement appealed from.

[20] Counsel for first respondent also sought to distinguish or limit the observation of the court in *In Re Cavander's Trusts*and submitted that an independent notice of appeal was only required in situations where there was a third party not party to the proceedings itself involved in the appeal. Counsel contended that this was the comment on *In Re Cavander's Trusts* made by the Ontario Court of Appeal (Canada) in *Bandur et al v Daiken et al* [1967] 1 OR 629–639

OUR DECISION

[21] Rule 8 of the RCOA 1994, in so far as was material for our consideration was in the following terms:

8 Notice of cross-appeal

(1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court *should be varied*, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal *specifying the grounds* thereof, ...

(2) Notice of cross-appeal shall be substantially in Form 2 in the First Schedule.

(3) ... (Emphasis added.)

[22] The operative part of Form 2 was as follows:

NOTICE OF CROSS-APPEAL

Take note that *on the hearing of the above appeal*, CD, the Respondent above named, will contend that the decision(s) of the Honourable Mr Justice ..... *ought to be varied to the extent* and on the grounds hereinafter set out:

(set out in numbered paragraphs –

(a) The nature of the relief claimed; and

(b) The grounds relied upon)

... (Emphasis added.)

[23] It was also pertinent to have in mind the rules of procedure pertaining to notice of appeals itself. Rule 5 stated as follows:

5 Appeal to be by re-hearing on notice.

(1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.

(2) ...

(3) A notice of appeal shall substantially be in Form 1 in the First Schedule.

(4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, *and what part, of the judgment or order is complained of.*

[24] Rule 6 required such notice of appeal to be served on all parties directly affected by the appeal or their solicitors respectively. No appeal however shall, except by leave of the court, be brought after the expiration of one month from the date on which the judgment or order appealed against was pronounced (r 12).

[25] In our assessment, the answer to the issue posed to us would turn on the

meaning to be assigned to the critical words used, namely, '... should be varied ... specifying the grounds thereof' and 'to be varied to the extent' in r 8 and Form 2 respectively of the RCOA 1994. The word 'vary' by itself was stated in the 'The Concise Oxford Dictionary' to mean – 'change, make different, modify'.

In our considered view, those words used did not carry with it a meaning that there could be a total or wholesale setting aside or review (of the substantive judgment or any findings of the court); the extent of any contention under a cross-appeal, in our scenario here, was to be limited to a modification or some slight difference to be made to that part only of the judgment appealed against.

This was borne out by the terminology used '... varied to the extent ...' clearly pointing to a limitation of sorts in the scope of the matters to be advanced by way of the cross-appeal, that is, those words being given an ordinary and natural reading.

[26] This was also consistent with the scheme of things, as we viewed it, envisaged under r 5 of the RCOA 1994. There it was provided for an appeal to be lodged against the whole or part of any judgment or order of court and such an appeal (in contrast to a cross-appeal) was by a re-hearing. The word 're-hearing' used here clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal (Form 1 of the RCOA 1994 also refers).

[27] In the cross-appeal here the first respondent was seeking to 'set aside' (it will be noted) the specific orders listed as (a)(i), (a)(ii) and (a)(iii) in the notice of cross-appeal that had been made against the first respondent relying on the grounds as set out in (b) in the notice of cross-appeal.

Counsel for the first respondent nevertheless agreed with us that the underlying intention and the submissions to be advanced in furthering the cross-appeal before us would be to show that the learned judge had erred when Her Ladyship found that there was a valid and concluded sale and purchase agreement between the first respondent and the appellant. Counsel's contention was that although the effect of such a position would be to have the whole or the substantive part of the decision of the learned judge set aside, it still fell within a 'variation' of the court judgment.

[28] We could not agree with this rather skilful attempt by counsel for the first respondent to explain away why a notice of appeal was not filed if the first

respondent was not satisfied and did not agree with the finding of the court that there was in existence a valid contract between the first respondent and the appellant. The orders of the court that the first respondent pay damages in lieu of specific performance (and further damages for expenses incurred and costs) without a doubt flowed directly from or was consequential to the principal finding that there was a binding contract between the first respondent and the appellant.

[29] The first respondent, having argued the case during the trial that there was no such contract concluded between the parties, and further having notice of the plaintiff's alternative prayer for damages in lieu of specific performance of the contract in the pleaded case of appellant, ought to have known what formed the very foundation of the orders made by the learned judge; there was no reasonable basis to assert that a 'pronouncement' to that effect had to be specifically made by the court on 11 March 2014.

[30] Even if the court's finding that there was such a valid and binding contract between the first respondent and the appellant was only evident from the grounds of judgment subsequently issued, we must state that the grounds were available on 20 May 2014 and the first respondent could well have applied for an extension of time to file a proper notice of appeal. Their failure to be vigilant in that respect could not in our view, be rectified by sneaking in through the process of cross-appeal to mount an attack as now intended on a material aspect of the judgment of the lower court, which was not the subject of the appeal itself.

[31] In this case the appellant (being satisfied as to the finding of fact that there was a binding contract but dissatisfied that no specific performance had been ordered) was appealing only against a part of the judgment, namely that the court ought to have in all the circumstances allowed the relief of an order of specific performance of the contract rather than that damages in lieu thereof be recovered from the first respondent.

Given that was the scope of the appeal itself, any cross-appeal by the first respondent that could be pursued was necessarily limited, as to the dissatisfaction with the damages in lieu (to be assessed), the further damages in the sum of RM841,691.94 and costs of RM150,000 ordered against the first respondent.

[32] We were fortified in the stand we had taken above by what was ruled by Jessel MR in *In Re Cavander's Trusts*. We were of the view that the principle stated there was not merely restricted to a situation where another party (other than the appellant was involved) but it laid down the rule that any cross-appeal must relate directly to the appeal brought by the appellant; otherwise there

ought to be a separate notice of appeal filed.

[33] We also had for reference the decision of the court in *National Society for the Distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280 (which was one of the cases referred in *Bandur et al*). It was held there that where a defendant appealed on the dismissal of his counterclaim, a cross notice to vary (under O 58 r 6 – English rules, as in *In Re Cavander's Trusts*) can only be available in connection with that appeal and cannot encompass a totally distinct matter, such as the relief sought by a plaintiff on his independent claim.

[34] In the *Secondary Generators v Gibbs*'s case Lindley MR had this to say:

> I wish to say one word upon the question of the plaintiff's cross-notice. If the learned Judge had not so linked the action and the counterclaim together as he did, and if the counsel in the court below had not more or less acquiesced in that view, I should have thought – and I think my brothers agree – that the plaintiffs would have been wrong in giving their cross-notice as distinguished from bringing a cross-appeal, in as much as that cross-notice was addressed, not merely to the counterclaim to which like appeal was confined, but to the totally different matter of their right to relief upon their action, which is a separate and distinct matter altogether.
>
> ...
>
> The 'appeal' referred to in rule 6 of Order LVIII is in this case the appeal by the defendant on her counterclaim; and reading the rule strictly and properly, the cross-notice could only be available in connection with the appeal from the order made on the counterclaim, and ought not to have been extended to a totally distinct matter – that is to say, to the relief sought by the plaintiffs on their claim.

[35] If need to be clarified that under the scheme of things prescribed by the then English Order LVIII, appeals to the Court of Appeal was to be brought by notice of motion in a summary way and it was not necessary for a respondent to give notice of motion by way of cross-appeal if the respondent intended upon hearing of the appeal to contend that the decision of the court below should be varied, provided the respondent within the time specified gave notice of such intention to all parties affected by such contention.

Hence appeals were to be brought by way of notice of motion to appeal and in respect of any cross-appeal to vary that decision of the court being appealed against, the respondent was only required to give notice of such intention.

[36] For purposes of comparison, the said Order LVIII r 1 and r 6 are reproduced below:

> ORDER LVIII

APPEALS TO THE COURT OF APPEAL

1 All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

...

6 It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall within the time specified i.e. the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

[37] One can easily see the similarity between our r 5 of the RCOA 1994 and the said r 1 of Order LVIII; in our case the appeal against whole or part of the judgment was to be by the filing of a 'Notice of Appeal' while the appeal under the then English procedural regime was to be by way of filing a 'notice of motion to appeal'.

In the case of a cross-appeal to vary on the other hand, r 8 of the RCOA 1994 required a 'Notice of Cross-Appeal' to be filed while under the then r 6 of Order LVIII, no 'motion by way of cross appeal' was required so long as notice of intention to vary was given. In other words, the 'Notice of Cross-Appeal' required under our RCOA 1994 took the place of the 'notice of intention to vary' in the then English rules which featured in the *Secondary Generators v Gibbs*'s case.

[38] For the reasons elaborated above, we found merit in the contention of the appellant. For all intents and purposes the effect sought by way of the first respondent cross-appeal was to set aside the finding of court that there was a 'concluded contract'. This could only be pursued by the first respondent by filing a proper and separate notice of appeal within the one month allowed for an appeal to be lodged.

[39] Accordingly, we ruled that the first respondent was precluded in the course of advancing their cross-appeal from raising any argument that there was no valid and concluded contract as held by the learned judge in the court below.

[40] Due to the serious ramifications arising from this ruling, the respondents requested for an adjournment of the hearing of the appeal to obtain further instructions of their respective clients. We allowed the same.

Reported by Kanesh Sundrum